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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 229

THE OLD MONASTERY COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

IRWIN GEIGER,
Counsel for Petitioner.



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STATUTES INVOLVED

Emergency Price Control Act of 1942, as amended (Act January 30, 1942, c. 26, Stat. 23) (50 U. S. C. A. App. Sec. 904):
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 229

THE OLD MONASTERY COMPANY,
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vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

Summary Statement of the Matter Involved

This petition for a writ of certiorari is directed against a judgment of the United States Circuit Court of Appeals for the Fourth Circuit affirming a judgment of conviction for conspiracy in violation of 18 U. S. C. A., Section 88.

Four individuals, including the petitioner corporation, were indicted in a one count indictment for conspiracy under Section 37 of the Penal Code (18 U. S. C. A., Sec. 88) to commit "offenses against the United States" (App. 1).[1]

[1] R. 2.

All record references are to pagination in Transcript of Record filed in United States Supreme Court.

The object of the alleged unlawful agreement was the intended violation of Section 4(a), (50 U. S. C. A. App. par. 904), of the Emergency Price Control Act of 1942 and Maximum Price Regulations 193 and 445 promulgated under that Act.

The case proceeded to trial against petitioner corporation alone, the indictment against its co-defendants being variously disposed of as hereinafter stated. The evidence adduced against petitioner at the trial in support of the alleged conspiracy merely established that a single sale at lawful ceiling price had been consummated between the Old Monastery Company of Seattle, Washington, as seller, and Walter A. Renken, a resident of Charleston, S. C., as buyer (App. 29 et seq.).[2]

In this transaction, R. Harold Ostrow, the then President of the petitioner corporation, acted for the corporation and Defendant Joseph N. Davis represented the buyer, Renken. There was evidence through Davis, who plead guilty and testified for the government, that he had paid Ostrow personally in cash a sum of money in excess of the lawful selling price. There was no evidence that the corporation had received any of the excess cash and there was positive unrefuted evidence conclusively negativing any inference that it might have. Davis lives in Greenville, S. C., but concluded the sale in San Francisco, where he met Defendant Ostrow by appointment (App. 30).[3] Ostrow, a resident of Seattle, Washington, more than three thousand (3,000) miles distant from the seat of the Trial Court at Greenville, S. C., was unable to attend the trial or participate in the proceedings by reason of a serious heart ailment from which he suffered. He tendered a plea of *nolo contendere* in absentia and offered to waive his right to be personally present and

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[2] R. 29-63.

[3] R. 30.

to submit to the judgment of the court. The Trial Court, upon investigation of his physical condition, accepted Ostrows' plea of *nolo contendere* (App. 5, 62),[4] and entered judgment against him thereon in his absence. The indictment against the Defendant Renken was nolled.

Various questions were seasonably urged in the Trial Court either by demurrer or motion to quash, or by motion for a directed verdict, or a new trial. Included among these were the sufficiency of the indictment and the evidence and that the Office of Price Administration regulations which formed the substantive basis for the alleged conspiracy are unconstitutional on their face in that they contravene Article 21, Section 2, of the Constitution.

The court below affirmed the Trial Court which declined to consider the constitutional challenge directed against the regulation, holding:

> "I must conclude that this Court has no jurisdiction to determine the validity of the regulations involved in this controversy upon the ground that such regulations are unconstitutional, or upon any other grounds" (*U. S.* v. *Renken*, 55 F. Supp. 1, 9).

In affirming the Trial Court's conclusion that it lacked jurisdiction, the court below held that the United States Emergency Court of Appeals was vested with exclusive jurisdiction to determine the validity of the Office of Price Administration regulation drawn into issue in this conspiracy indictment. This is in direct conflict with the determination by that court in *Taub, et al.*, v. *Price Administrator*, now pending on petition for a writ of certiorari in this Court, No. 195, which holds that the United States Emergency Court of Appeals likewise has no jurisdiction over the same issue.

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[4] R. 5, 62.

Jurisdictional Statement

The jurisdiction of this Court to entertain this petition for a writ of certiorari to review the judgment below is invoked under favor of Section 240 of the Judicial Code, as amended, Title 28, U. S. C. A. Sec. 347:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect, as if the cause had been brought there by unrestricted writ or error or appeal."

The judgment below against which this petition for a writ of certiorari is directed was entered on June 12, 1945.

Questions Presented

The questions presented by petitioners are as follows:

1. Is not an indictment for a conspiracy which denounces an agreement to do a lawful act—selling distilled spirits—in an unlawful manner—at prices in excess of the prescribed maximum—fatally defective in the absence of any allegation explaining the plan or scheme which is the gist of the denounced crime inasmuch as the words buy, sell and deliver have per se no sinister or criminal connotation?

2. Does the District Court in an indictment for conspiracy have jurisdiction to determine the constitutional validity of Office of Price Administration regulations which form the substantive basis for the alleged criminal

agreement where the claimed constitutional infirmity is apparent on the face of the regulation?

3. Inasmuch as the court below holds that the District Court is without jurisdiction to determine the constitutional validity of an Office of Price Administration regulation drawn into issue in an indictment for conspiracy under 18 U. S. C. A., Sec. 88, and concludes that the United States Emergency Court of Appeals has sole jurisdiction of such issue and the United States Emergency Court of Appeals has held that it lacks jurisdiction, is 18 U. S. C. A., Sec. 88, a lawful vehicle for prosecuting alleged agreements to violate Section 4(a) of the Emergency Price Control Act of 1942, as amended, particularly in view of the specific provision of that section condemning such agreements as substantive offenses under the Emergency Price Control Act.

4. Where substantive offense, by its inherent nature as here, requires plurality of persons and proof shows that there is an identity of personnel in the conspiracy and in the consummated substantive offense, can such participants be lawfully prosecuted for conspiracy to commit the identical substantive offense?

5. Where the proof in a conspiracy case conclusively establishes that petitioner corporation neither received nor was to receive any benefit from the conspiracy, does evidence that the petitioner corporation was availed of by its then president for his personal advantage and to its actual detriment justify submission of case against corporation to the jury?

Reasons Relied on for Allowance of Writ of Certiorari

1. The questions presented for consideration involve the determination of problems of jurisdiction and procedure under an important federal statute which vitally

affect the orderly administration of justice. These questions have not been heretofore presented for consideration here and should be settled by this Court.

2. The decision of the court below that the United States Emergency Court of Appeals is the sole forum to which may be addressed a constitutional challenge of the validity of an Office of Price Administration regulation drawn into issue in an indictment for conspiracy is in direct conflict with the decision of the United States Emergency Court of Appeals in *Taub, et al.*, v. *Price Administrator*, decided June 6, 1945, now pending on petition for a writ of certiorari in this Court. This conflict on an important question of Federal law should be settled by this Court.

3. The extent to which the conspiracy statute (18 U. S. C. A., Sec. 88) is applicable to a substantive offense whose nature necessarily involves the mutual cooperation of two or more persons where the substantive offense was in fact consummated by the identical persons charged with conspiracy to commit the same offense presents an important question of Federal law which should be settled by this Court.

WHEREFORE, your petitioner respectfully prays that the writ of certiorari may issue out of and under the hand and seal of this Court directed to the United States Circuit Court of Appeals, Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of said United States Circuit Court of Appeals, Fourth Circuit, in said cause therein entitled The Old Monastery Company, Appellant, v. United States of America, Appellee, No. 9177, to the end that said cause may be reviewed and

determined by this Court and that judgment of said United States Circuit Court of Appeals, Fourth Circuit, in said cause may be reversed by this Court.

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Petitioner,

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